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2 **NOT FOR PUBLICATION**  
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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
8

9 Cedric R. Allen, ) No. CV-05-0145-SRB (PC)  
10 Plaintiff, ) **ORDER**  
11 vs. )  
12 )  
13 R. Hernandez, et al., )  
14 Defendants. )  
15

16 The Court now considers Defendants’ Motion for Summary Judgment (Doc. 33) and  
17 Plaintiff’s Motion for Opposition to Defendants Summary Judgment (“Plaintiff’s  
18 Opposition”), which requests summary judgment in Plaintiff’s favor (Doc. 37).

19 **I. BACKGROUND**

20 Plaintiff Cedric R. Allen is a California prisoner proceeding *pro se* who was  
21 transferred to the California State Prison Corcoran (“CSP-Corcoran”) on August 7, 2003 to  
22 serve terms in a Security Housing Unit (“SHU”) because of mental illness and disciplinary  
23 violations. (Defs.’ Statement of Undisputed Facts (“DSOF”) at 1-3.) While being escorted  
24 from the bus on arrival, Plaintiff became verbally abusive toward staff, using threats and  
25 obscenities. (DSOF, Ex. A, Attach. 1 at 42-68.) Plaintiff testified that he didn’t remember  
26 exactly what he said to staff that day, but that he “challenged them,” gave them “back-talk,”  
27 and did not cooperate with instructions. (DSOF, Ex. C, Pl.’s Dep. 11:7-12:25, 15:13-16:6.)  
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1 Plaintiff swung his elbows at staff, who then held him on the ground and applied leg  
2 restraints. (DSOF, Ex. A, Attach. 1 at 42.)

3 The incidents at issue in this lawsuit occurred on August 9, 2003. Plaintiff  
4 complained to Officer Hernandez that he had not been given breakfast that morning. (DSOF  
5 ¶ 11, Ex. C, Pl.'s Dep. 17:12-17, 19:20-21:20.) Plaintiff stated that he became "highly upset"  
6 because he had not been fed and had "words back and forth" with Officer Hernandez.  
7 (DSOF ¶ 11, Ex. C, Pl.'s Dep. 20:18-21:20.) Plaintiff testified that he "was intentionally  
8 trying to get out of [his] cell so [they] could face each other." (DSOF ¶ 11, Ex. C, Pl.'s Dep.  
9 21:16-17.) Later that morning, as Officer Bautista was escorting Medical Technical  
10 Assistant ("MTA") Maldonado on her rounds, Plaintiff lied to Maldonado and falsely  
11 claimed that he was suicidal so that he could get out of his cell and confront Officer  
12 Hernandez in a holding cell "face-to-face." (DSOF ¶ 12, Ex. A, Attach. 1 at 69-103; Ex. C,  
13 Pl.'s Dep. 21:22-24:9.) Plaintiff knew that if he claimed to be suicidal, he would be escorted  
14 to a holding cell and then put under psychiatric care. (DSOF ¶ 12, Ex. C, Pl.'s Dep. 22:12-  
15 20.) Plaintiff hoped to be able to confront Officer Hernandez without his handcuffs on.  
16 (DSOF, Ex. C, Pl.'s Dep. 23:25-24:9.)

17 Officers Hernandez and Pruneda responded to Officer Bautista's request for help  
18 escorting Plaintiff to a holding cell. (DSOF ¶ 13, Ex. A, Attach. 1 at 81.) Officer Hernandez  
19 instructed Plaintiff to turn around and put his hands through the tray port so he could be  
20 handcuffed. (DSOF ¶ 13, Ex. C, Pl.'s Dep. 26:4-27:6.) The officers handcuffed Plaintiff,  
21 closed the food port, and opened the cell door. (DSOF ¶ 13, Ex. C, Pl.'s Dep. 27:7-13.)  
22 Officers Hernandez and Pruneda each held one of Plaintiff's arms and escorted him to the  
23 holding cell, which was approximately ten to twenty feet away. (DSOF ¶ 13, Ex. C, Pl.'s  
24 Dep. 28:20-29:13.) Plaintiff claims that he was "more [or] less dragged, rather than escorted  
25 to the holding cell." (Pl.'s Opp'n at 3.) While walking to the holding cell, Plaintiff and the  
26 officers exchanged words and Plaintiff challenged them to take off his handcuffs so they  
27 could fight. (DSOF ¶ 13, Ex. A, Attach. 1 at 69; Ex. C, Pl.'s Dep. 29:16-22, 41:1-8.)  
28 Plaintiff claims that he called Defendants a "bunch of prejudice [sic] Mexicans" and that this

1 angered the officers. (Pl.'s Opp'n at 4.) Plaintiff also claims that Officer Hernandez used  
2 obscenities and verbally taunted Plaintiff on the way to the holding cell. (Pl.'s Opp'n at 4.)

3 Officers Hernandez and Pruneda took Plaintiff into the holding cell and had him "up  
4 against the wall" and were "wrestling" with him. (DSOF ¶ 14, Ex. C, Pl.'s Dep. 30:3-13.)  
5 Plaintiff testified that the officers did not physically hit, punch, or knee him or bang his head  
6 against the wall, and described Officer Hernandez's conduct as "almost comical." (DSOF  
7 ¶ 14, Ex. C, Pl.'s Dep. 30:3-31:7, 42:13-19.) Plaintiff challenged the officers to take his  
8 handcuffs off using obscene language. (DSOF ¶ 14, Ex. C, Pl.'s Dep. 30:14-18.) Plaintiff  
9 testified that Officer Hernandez left the holding cell and then play slap boxed through the  
10 bars of the holding cell, ducking and dodging in a "playful way." (DSOF ¶ 15, Ex. C, Pl.'s  
11 Dep. 31:1-32:4.) Plaintiff stated that Officer Hernandez was not really trying to slap him and  
12 didn't actually hit him. (DSOF ¶ 15, Ex. C, Pl.'s Dep. 32:1-19.) Officer Hernandez returned  
13 to the holding cell several times. (DSOF ¶ 16, Ex. C, Pl.'s Dep. 32:20-22, 38:1-7.) Officers  
14 Hernandez and Pruneda reported that Plaintiff spit on them. (DSOF, Ex. A, Attach. 1 at 91-  
15 96.) Plaintiff denies that he spit on the officers and describes himself as "a kicker. I will  
16 kick you, but I will not spit on you." (DSOF, Ex. C, Pl.'s Dep. 33:21-24.) Plaintiff admitted  
17 throwing toilet water on staff during previous incidents but denied ever spitting on an officer.  
18 (DSOF Ex. C, Pl.'s Dep. 35:14-36:9.)

19 Sergeant Beer responded to an alarm, and Officer Hernandez told him that Plaintiff  
20 had spit on him and Officer Pruneda. (DSOF ¶ 16, Ex. C, Pl.'s Dep. 38:21-39:9.) Officer  
21 Hernandez tried to apply a spit mask to Plaintiff, but it tore. (DSOF ¶ 16, Ex. C, Pl.'s Dep.  
22 39:10-13, 45:1-6.) Plaintiff stated that Officer Hernandez "gave it a pull a couple times"  
23 before the officers put Plaintiff on the ground. (DSOF ¶ 16, Ex. C, Pl.'s Dep. 39:10-13, 45:1-  
24 6.) Plaintiff's shoes were removed and leg restraints were applied. (DSOF ¶ 16, Ex. C, Pl.'s  
25 Dep. 45:20-23.) Sergeant Beer put his knee on Plaintiff's neck or back and threatened to  
26 "mace" him in the mouth if he kept talking. (DSOF ¶ 16, Ex. C, Pl.'s Dep. 46:2-47:7.)  
27 Plaintiff stated that he had difficulty breathing while he was held down, but that he did not  
28 have any injury from having difficulty breathing and that he was never actually sprayed with

1 mace. (DSOF ¶ 16, Ex. C, Pl.'s Dep. 46:21-47:22.) Plaintiff testified that he was held on  
2 the ground for ten minutes while officers got another spit mask and put it on him, and now  
3 claims in his Opposition that he was on ground for fifteen to twenty minutes. (DSOF ¶ 16,  
4 Ex. C, Pl.'s Dep. 48:18-23; Pl.'s Opp'n at 7.) Plaintiff testified that he "mouthed off,"  
5 challenged staff, and "manipulated myself out of the cell," but "didn't do anything wrong."  
6 (DSOF ¶ 17, Ex. C, Pl.'s Dep. 48:9-11.)

7 Plaintiff was then escorted to the infirmary by officers other than Defendants. (DSOF  
8 ¶ 17, Ex. C, Pl.'s Dep. 48:25-49:13.) When Plaintiff was medically examined on that day,  
9 he testified that he was not physically hurt, was not suicidal, did not need to see the  
10 psychiatrist, and had only said that he was suicidal to get out of his cell. (DSOF ¶ 18, Ex.  
11 C, Pl.'s Dep. 50:3-17.) Plaintiff stated that he never had any "real injury" and that he might  
12 have had "some bruises" but "never anything substantial" or "significant" like a "busted lip"  
13 or a black eye. (DSOF ¶ 18, Ex. C, Pl.'s Dep. 50:10-17, 52:13-14.) At his deposition,  
14 Plaintiff confirmed that he told medical staff on the day of the incident that he had no  
15 injuries. (DSOF ¶ 20, Ex. C, Pl.'s Dep. 51:5-52:1.) Plaintiff's medical records note that he  
16 told medical staff that he had lied about being suicidal. (DSOF ¶ 19, Ex. B, Attach. 1 at 29;  
17 Ex. C, Pl.'s Dep. 51:1-17.) Plaintiff also told Officers Bautista and Coffia that he had lied  
18 about being suicidal so he could get out of his cell. (DSOF ¶ 19, Ex. A, Attach. 1 at 82, 87.)  
19 After his medical examination, Plaintiff was escorted back to his housing unit, where  
20 Sergeant Beer gave him lunch and told him that he would be moved to a different housing  
21 unit so that he would be separated from Officer Hernandez. (DSOF ¶ 19, Ex. C, Pl.'s Dep.  
22 58:1-59:6.) Officer Bautista and Sergeant Beer reported that Plaintiff had admitted to  
23 spitting on Officers Hernandez and Pruneda. (DSOF ¶ 19, Ex. A, Attach. 1 at 82, 85.)

24 Plaintiff was treated by a physician on August 13, 2003. (DSOF ¶ 20, Ex. B, Attach.  
25 1 at 32.) Plaintiff complained of minor back problems and described the altercation with  
26 officers on August 9. (DSOF ¶ 20, Ex. B, Attach. 1 at 32.) Plaintiff reported that he had  
27 suffered numerous minor abrasions and minor head injuries and wanted pain medication.  
28 (DSOF ¶ 20, Ex. B, Attach. 1 at 32.) Plaintiff stated that medical staff had not completed a

1 CDCR Form 7219 (Medical Report of Injury); however, Plaintiff later confirmed that the  
2 form was in fact completed. (DSOF ¶ 20, Ex. A, Attach. 1 at 97; Ex. B, Attach. 1 at 32; Ex.  
3 C, Pl.'s Dep. 51:5-20.) The physician noted one contusion, bruising on the left triceps, and  
4 a small healing scab on the right ankle. (DSOF ¶ 20, Ex. B, Attach. 1 at 32.) Plaintiff said  
5 that the bruising and abrasions were not significant, and that the scab could have come from  
6 the use of leg restraints. (DSOF ¶ 20, Ex. C, Pl.'s Dep. 52:2-53:1.)

7 Plaintiff was charged and found guilty of a disciplinary violation for battery on staff  
8 as a result of the incident on August 9, 2003. (DSOF ¶ 21, Ex. A, Attach. 1 at 69-74.) On  
9 August 23, 2003, Plaintiff submitted a grievance claiming that Defendants had assaulted him  
10 on August 9, that MTA Maldonado had not examined him for chest pain or injuries after the  
11 incident, and that their conduct was racially motivated and in retaliation for Plaintiff's prior  
12 assault on Sergeant Fisher. (DSOF ¶ 22, Ex. A, Attach. 1 at 104-09.) Plaintiff's grievance  
13 was denied at all levels. (DSOF ¶ 22, Ex. A, Attach. 1 at 104-09.) Plaintiff filed suit in this  
14 Court on February 2, 2005. The Court now considers Defendants' Motion for Summary  
15 Judgment and Plaintiff's Opposition, which requests summary judgment in Plaintiff's favor.

## 16 **II. LEGAL STANDARDS AND ANALYSIS**

### 17 **A. Failure to Comply with Local Rules**

18 Defendants' Reply argues that Plaintiff's Motion should be stricken and summary  
19 judgment entered for Defendants because Plaintiff has failed to comply with local rules  
20 governing summary judgment oppositions. (Defs.' Reply to Pl.'s Opp'n ("Defs.' Reply")  
21 at 2.) Local Rule 56-260(b) requires:

22 Any party opposing a motion for summary judgment or summary  
23 adjudication shall reproduce the itemized facts in the Statement of  
24 Undisputed Facts and admit those facts that are undisputed and deny  
25 those that are disputed, including with each denial a citation to the  
26 particular portions of any pleading, affidavit, deposition,  
27 interrogatory answer, admission or other document relied upon in  
28 support of that denial. The opposing party may also file a concise  
"Statement of Disputed Facts," and the source thereof in the record,  
of all additional material facts as to which there is a genuine issue  
precluding summary judgment or adjudication.

1 The Statement of Facts included in Plaintiff's Memorandum of Points and Authorities in  
2 Support of Plaintiff's Motion fails to comply with these local rules because it does not refer  
3 to the record evidence and Plaintiff has failed to reproduce the itemized facts in Defendants'  
4 Statement of Undisputed Facts and either admit or deny those facts. "The remedy for  
5 Plaintiff's failure to address Defendants' undisputed facts and Defendants' evidence is to  
6 consider this evidence as undisputed." *Collins v. County of Kern*, 390 F. Supp. 2d 964, 971-  
7 72 (E.D. Cal. 2005). In the interest of justice, the Court declines to grant Defendants'  
8 Motion on the ground that Plaintiff failed to comply with Local Rule 56-260(b) and will  
9 consider Plaintiff's Opposition to determine whether it contains any evidence to refute  
10 Defendants' evidence. The Court will consider both parties' Motions and the attached  
11 Exhibits in deciding whether either party is entitled to summary judgment.

#### 12 **B. Motions for Summary Judgment**

13 The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules  
14 of Civil Procedure. Under Rule 56, summary judgment is properly granted when: (1) no  
15 genuine issues of material fact remain; and (2) after viewing the evidence most favorably to  
16 the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R.  
17 Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of*  
18 *N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). A fact is "material" when, under the  
19 governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty*  
20 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" of material fact arises if "the  
21 evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

22 In considering a motion for summary judgment, the court must regard as true the  
23 non-moving party's evidence, if it is supported by affidavits or other evidentiary material.  
24 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party  
25 may not merely rest on its pleadings; it must produce some significant probative evidence  
26 tending to contradict the moving party's allegations, thereby creating a material question  
27  
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1 of fact. *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative  
2 evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l*  
3 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

4 Plaintiff brings claims pursuant to 42 U.S.C. § 1983 against Defendants Pruneda,  
5 Hernandez, and Beer for excessive force under the Cruel and Unusual Punishments Clause  
6 of the Eighth Amendment. The United States Supreme Court has held that “whenever prison  
7 officials stand accused of using excessive physical force in violation of the Cruel and  
8 Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley*: whether  
9 force was applied in a good-faith effort to maintain or restore discipline, or maliciously and  
10 sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (citing *Whitley v.*  
11 *Albers*, 475 U.S. 312, 321-22 (1986)). The Court observed that:

12 Many of the concerns underlying our holding in *Whitley* arise  
13 whenever guards use force to keep order. Whether the prison  
14 disturbance is a riot or a lesser disruption, corrections officers must  
15 balance the need “to maintain or restore discipline” through force  
16 against the risk of injury to inmates. Both situations may require  
17 prison officials to act quickly and decisively. Likewise, both  
implicate the principle that “[p]rison administrators . . . should be  
accorded wide-ranging deference in the adoption and execution of  
policies and practices that in their judgment are needed to preserve  
internal order and discipline and to maintain institutional security.”

18 *Id.* at 7 (quoting *Whitley*, 475 U.S. at 321-22) (internal quotations omitted).

19 The Court recognized that “corrections officials must make their decisions ‘in haste,  
20 under pressure, and frequently without the luxury of a second chance.’” *Id.* at 6 (quoting  
21 *Whitley*, 475 U.S. at 320). “[C]ourts must determine whether the evidence goes beyond a  
22 mere dispute over the reasonableness of a particular use of force or the existence of arguably  
23 superior alternatives.” *Whitley*, 475 U.S. at 322. In determining whether the use of force was  
24 “wanton and unnecessary,” the Court may properly consider the extent of injury suffered by  
25 an inmate, “the need for application of force, the relationship between that need and the  
26 amount of force used, the threat ‘reasonably perceived by the responsible officials,’ and ‘any  
27 efforts made to temper the severity of a forceful response.’” *Hudson*, 503 U.S. at 7 (quoting  
28 *Whitley*, 475 U.S. at 321). “The Eighth Amendment’s prohibition of ‘cruel and unusual’

1 punishments necessarily excludes from constitutional recognition *de minimis* uses of physical  
2 force, provided that the use of force is not of a sort ‘repugnant to the conscience of  
3 mankind.’” *Id.* at 9-10 (quoting *Whitley*, 475 U.S. at 327) (internal quotations omitted).

4       The officers moved Plaintiff to the holding cell and attempted to control him after he  
5 became verbally abusive and threatening and falsely claimed to be suicidal in order to get out  
6 of his cell and confront Officer Hernandez. Plaintiff admitted in his deposition that he did  
7 not have any significant injuries as a result of the incident and that he did not report any  
8 injuries to examining medical staff on the day of the incident. (DSOF ¶ 18, Ex. C, Pl.’s Dep.  
9 50:3-17, 51:5-52:1, 52:13-14.) The examining physician, who saw Plaintiff six days after  
10 the altercation, found only one contusion, bruising on the upper left arm, and a small healing  
11 scab on the left ankle, likely caused by the leg restraints. (DSOF ¶ 20, Ex. B, Attach. 1 at  
12 32.) The use of force was minimal and reasonable under the circumstances, and there is no  
13 evidence showing that it was applied maliciously or sadistically to cause harm.

14       Plaintiff disputes the assertion that he spit on Officers Hernandez and Pruneda as they  
15 were escorting him to the holding cage. However, this does not create a genuine issue of  
16 material fact, because even assuming that Plaintiff did not spit on the officers, their use of  
17 force in escorting him to the holding cell, “wrestling” with him, applying a spit mask,  
18 holding him down, and applying leg restraints was applied in a good faith effort to maintain  
19 discipline. Similarly, Sergeant Beer’s use of force in putting his knee on Plaintiff’s back or  
20 neck while other officers applied the spit mask and leg restraints was applied in a good faith  
21 effort to maintain discipline after it was reported to him that Plaintiff had spit at officers.  
22 Sergeant’s Beer’s threat to use mace if Plaintiff did not stop talking also does not rise to the  
23 level of a constitutional deprivation under § 1983. *See Oltarzewski v. Ruggiero*, 830 F.2d  
24 136, 139 (9th Cir. 1987) (“[V]erbal harassment or abuse . . . is not sufficient to state a  
25 constitutional deprivation under 42 U.S.C. § 1983.”) (internal quotations omitted).

26       Plaintiff’s Opposition claims that he was beaten in the holding cell and that he did  
27 report physical injuries. (Pl.’s Opp’n at 4-11.) However, these claims are contradicted by  
28 Plaintiff’s deposition testimony, and he cannot create an issue of fact based on declarations



1 that are contradicted by his prior deposition testimony. *See Kennedy v. Allied Mut. Ins. Co.*,  
2 952 F.2d 262, 266 (9th Cir. 1991) (“The general rule in the Ninth Circuit is that a party  
3 cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.”).  
4 Plaintiff testified that the officers did not physically hit, punch, or knee him and described  
5 Officer Hernandez’s conduct as “almost comical.” (DSOF ¶ 14, Ex. C, Pl.’s Dep. 30:3-31:7.)  
6 Plaintiff explained at his deposition that the officers “wrestled” with him but did not slam his  
7 head against the wall or cause any injuries. (DSOF ¶ 14, Ex. C, Pl.’s Dep. 42:13-19, 44:1-  
8 17.) As discussed above, Plaintiff described his injuries as not significant and did not report  
9 any injuries to examining medical staff on the day of the incident. (DSOF ¶ 18, Ex. C, Pl.’s  
10 Dep. 50:3-17, 51:5-52:1, 52:13-14.) The injuries found by the examining physician six days  
11 later were only minor.

12 Plaintiff also claims that he was strangled and choked by the torn spit mask and had  
13 difficulty breathing when he was held on the ground. (Pl.’s Opp’n at 5-9.) Plaintiff’s  
14 description in his deposition of Officer Hernandez’s attempt to apply the spit mask states that  
15 he “gave it a pull a couple times,” but Plaintiff did not experience any injuries due to the use  
16 of the spit mask or due to his difficulty breathing when he was held down. (DSOF ¶ 16, Ex.  
17 C, Pl.’s Dep. 39:10-13, 45:1-6, 46:21-47:22.) Considering the extent of Plaintiff’s injuries,  
18 the need for the application of force, the relationship between that need and the amount of  
19 force used, and the threat reasonably perceived by the officers, it is clear that the force used  
20 was applied in a good faith effort to maintain discipline. No genuine issues of material fact  
21 remain, and, after viewing the evidence most favorably to Plaintiff, Defendants are clearly  
22 entitled to prevail as a matter of law.<sup>1</sup>

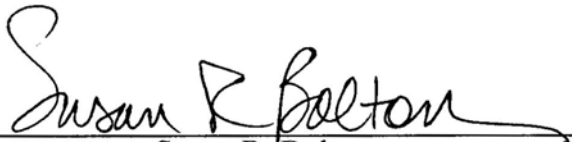
23 **IT IS ORDERED** granting Defendants’ Motion for Summary Judgment (Doc. 33)  
24 and denying Plaintiff’s Motion for Opposition to Defendants Summary Judgment, which  
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27 <sup>1</sup>Because the Court concludes that Plaintiff has failed to show a violation of the Eighth  
28 Amendment, the Court does not reach Defendants’ argument concerning qualified immunity.

1 requests summary judgment in Plaintiff's favor (Doc. 37). The Clerk of the Court is directed  
2 to enter judgment in favor of Defendants.

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4 DATED this 19<sup>th</sup> day of March, 2009.

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9 Susan R. Bolton  
United States District Judge  
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